STANDARD CHARTERED BANK MALAYSIA BHD A

v.

CITY PROPERTIES SDN BHD & ANOR

HIGH COURT MALAYA, KUALA LUMPUR B
VINCENT NG J
[ORIGINATING SUMMONS NO: D1-24-308-2006]
18 JULY 2007

ARBITRATION: *Agreement - Arbitration clause - Validity of demand made on retention bond - Whether within purview of arbitration clause - Arbitration Act 2005, s. 10* C

CIVIL PROCEDURE: *Stay of proceedings - Arbitration clause - Subject matter of proceedings - Validity of demand made on retention bond - Whether within purview of arbitration clause - Arbitration Act 2005, s. 10* D

CONTRACT: *Building contract - Arbitration clause - Validity of demand made on retention bond - Whether within purview of arbitration clause - Arbitration Act 2005, s. 10* E

The plaintiff bank applied, amongst others, on the validity of a demand made by the first defendant on a Retention Bond ('RB') issued by the plaintiff in favour of the first defendant pursuant to a construction contract entered between the first and the second F defendants. The second defendant subsequently applied under s. 10 of the Arbitration Act 2005 ('Act 2005'), amongst others, for a stay of the proceedings pending arbitration. As soon as the latter application was filed, the plaintiff notified both the defendants that it would abide by any order the court might G make. As the plaintiff had taken a neutral stance, the issue was whether the RB dispute could be decided within the ambit of the construction agreement between the first and the second defendants who were parties to the arbitration clause in the said agreement. H

Held (allowing application for stay of proceedings):

(1) Section 10 of the Arbitration Act 2005, with the use of the word 'shall' makes it mandatory for the court to stay the proceedings in respect of any matter before which any I proceedings are brought and refer the parties to arbitration

unless it finds (a) that the agreement is null and void, inoperative or incapable of being performed; or (b) that there is in fact no dispute between the parties with regard to the matters to be referred. The court's discretion to impose any direction as it deems fit when making an order for stay is encumbered under Act 2005. (para 13)

(2) Neither of the two exceptions in s. 10(1)(a) or (b) of Act 2005 apply in the present case. The first defendant itself had said that one of the two issues pertaining to the RB would entail the determination of the question whether the second defendant was subject to a contractual obligation to maintain the RB, the other being whether the first defendant was justified to make the call on the RB under the construction contract. The determination of those two issues would necessitate a finding whether there was any breach or non-performance of the construction contract – the very crux of the dispute in the ongoing arbitration proceedings. (para 15)

(3) An interpretation of the arbitration cl. 34, "any matter or thing of whatsoever nature arising thereunder or in connection therewith" and "any dispute or difference arise … either during the progress or after completion or abandonment of the works" in cl. 34, rather than the restrictive words "under this agreement" denoted a clear intention of both parties to have a very much wider ambit for arbitral method of dispute resolution. For those reasons, cl. 34 was wide enough to bring the issue of the RB within the ambit of the ongoing arbitral proceedings. (para 19)

(4) The issue of the RB raised in the plaintiff's originating summons before this court had been mutually submitted to the jurisdiction of the arbitral tribunal by the first and second defendants and were due to be determined in the arbitration now afoot. It would follow that the first defendant was now estopped from contending otherwise. In the circumstances, where there is a clear overlap between the issues to be determined by this court and the arbitral tribunal, a common law court should yield to the latter by giving s. 10(1) of Act 2005 its clearly intended effect. (para 22)

(5) The RB dispute was merely an issue incidental to the cause of action between the two defendants and that issue could be resolved in the arbitration proceedings. The plaintiff need not be a party to the arbitration agreement *vis-a-vis* with both or any one of the two defendants since the plaintiff was merely drawn into the fray on the issue of the RB which had arisen only between the defendants. (para 23)

Case(s) referred to:

Accounting Publication Sdn Bhd v. Ho Soo Furniture Sdn Bhd [1999] 1 CLJ 765 CA ***(refd)***

Cargil Internation SA and Anor v. Bangladesh Sugar & Food Industries Corporation [1998] 2 All ER 406 ***(refd)***

Chan Whye & Sons Contractors (suing as a firm) v. Sarawak Shell Bhd [2003] 5 MLJ 68 ***(refd)***

Datuk Yap Pak Leong v. Sababumi (Sandakan) Sdn Bhd [1997] 1 CLJ 23 CA ***(refd)***

Esso Petroleum Malaysia Inc v. Kago Petroleum Sdn Bhd [1995] 1 CLJ 283 SC ***(refd)***

Government of Gibraltar v. Kenney & Another [1956] 3 All ER 22 ***(refd)***

Haymen & Anor v. Darwins Ltd [1942] 1 All ER ***(refd)***

Inter Maritime Management Sdn Bhd v. Kai Tai Timber Company Ltd Hong Kong [1995] 4 CLJ 164 CA ***(refd)***

Isyoda (M) Sdn Bhd v. Mimos Bhd [2000] 1 MLJ 227 ***(refd)***

Lai Kim Loi v. Dato Lai Fook Kim & Anor & Co [1989] 2 CLJ 107; [1989] 1 CLJ (Rep) 61 SC ***(refd)***

Perbadanan Kerajaan Negeri Perak v. Asean Security Paper Mill Sdn Bhd [1991] 3 CLJ 2400; [1991] 1 CLJ (Rep) 362 SC ***(refd)***

Seloga Jaya Sdn Bhd v. Pembenaan Keng Ting (Sabah) Sdn Bhd [1994] 2 CLJ 716 SC ***(refd)***

The Royal Bank of Scotland Ltd v. Citrusdal Investments Ltd [1971] 3 All ER 558 ***(refd)***

Legislation referred to:

Arbitration Act 2005, ss. 9, 10(1)(a), (b), 18

Other source(s) referred to:

Halsbury's Laws of England, 4th edn, vol 9 para 316

Halsbury's Laws of England, 4th edn, vol 37, pp 335-336

For the plaintiff - Jack Yow; M/s Shearn Delamore & Co

For the 1st defendant - Ranjit Singh (Goh Hui Ring with him); M/s Goh Haslinda & Partners

For the 2nd defendant - En Gananathan P; M/s Goh Haslinda & Partners

Reported by Usha Thiagarajah

A

JUDGMENT

Vincent Ng J:

[1] In the above originating summons filed on 21 August 2006 (encl. 1) the plaintiff bank (the bank) had prayed, *inter alia*, for declarations as to:

B

(i) the validity of the extension of Amendment No. 12 (if it has been validly extended and as to whether it has been cancelled by the second defendant); and

C

(ii) the validity of the purported demand/call made by the first defendant under the Retention Bond.

The 2nd Defendant's Case

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[2] Now before me for decision is the second defendant's application (*vide* encl. 6) pursuant to s. 10 of the Arbitration Act 2005 and/or under the inherent jurisdiction of the court for the following orders:

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1. that all the proceedings in this action be stayed and the first and second defendants be referred to arbitration;

2. that the second defendant be granted an extension of time of two (2) weeks to file and serve an affidavit in opposition to the originating summons in the event that prayer (1) is dismissed;

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3. that the costs of this action and this application be provided for;

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4. such other or further relief which this court deems fit and proper.

[3] As soon as encl. 6 was filed, the bank took the very proper course of notifying both the defendants that they would abide by any order which the court might make.

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Common Ground

[4] The common ground between all parties are as follows:

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(a) the plaintiff is agreeable to abide with whatever directions and decisions of this court in respect of the above proceedings;

(b) the subject matter of the current proceedings is the irrevocable unconditional Retention Bond ('Retention Bond') issued by the plaintiff in favour of the first defendant *vide* letter of guarantee dated 14 January 2004 pursuant to a Construction Contract dated 15 August 2002 ('Construction Contract');

(c) there is already an ongoing arbitration proceedings between the first defendant and the second defendant in respect of disputes arising out of the construction contract and the plaintiff is neither a party to the arbitration contract nor a party in the arbitration;

(d) the plaintiff has taken a neutral stance on encl. 6, and the facts surrounding the disputes sought to be referred to arbitration are not in dispute.

(e) the said Retention Bond was extended twelve (12) times until it was purportedly cancelled by the second defendant's *vide* exh. 'PC7' of encl. 1.

The Respective Arguments

The Second Defendant's Arguments

[5] It is submitted by the second defendant that the disputes are matters that arise out of or incidental to the Construction Contract entered into between the first and second defendant. And, the disputes, including the dispute on the Retention Bond are clearly within the purview of the arbitration cl. 34 of the said contract. Further, the first and second defendants have submitted these other disputes to arbitration and the Retention Bond issue ought to be also determined in the ongoing arbitration proceedings. The applicable law is s. 10 of the Arbitration Act 2005 by virtue of the arbitral proceedings having been commenced after the coming into operation of this Act. Unlike the previous provision in s. 6 of the 1952 Act, where the court could exercise its discretion in deciding whether a stay pending arbitration ought to be granted, it is now mandatory that proceedings be stayed. In acknowledging that the Retention Bond has expired and that its claim is now limited to damages for breach of contract between the parties, the first defendant has in effect submitted the disputes encompassed in encl. 1 herein into the ambit of the arbitration proceedings (see the defence and counterclaim dated 6 February

2007, filed in arbitral proceedings, which was exhibited in the second defendant's points of claim dated 22 December 2006, under exh. 'LCM4' of encl. 10, at pp. 47 and 72).

[6] It is also contended by the second defendant that the same questions and issues now before this court would arise in the arbitration proceedings if a stay is not granted. Aside from the fact that this could lead to inconsistent and conflicting decisions being made by this court and the arbitral tribunal, such duplicity would *prima facie* be frivolous and oppressive. (see *Halsbury's Laws of England* (4th edn.) vol. 37 at pp. 335-336, *The Royal Bank of Scotland Ltd v. Citrusdal Investments Ltd* [1971] 3 All ER 558 at p. 562 and *Lai Kim Loi v. Dato Lai Fook Kim & Anor* [1989] 2 CLJ 107; [1989] 1 CLJ (Rep) 61). The arbitral tribunal is fully equipped and is clothed with jurisdiction to determine the very issues and questions brought by the plaintiff to this court. Furthermore, by virtue of s. 18 of the Arbitration Act 2005, it is no longer open to the first defendant to challenge the jurisdiction of the arbitral tribunal to fully determine those issues and questions. And, if all contractual disputes between the parties are determined in the arbitral proceedings there would be an accounting between the first and second defendants which would have to include monies due under the Retention Bond. In that circumstance, the arbitral tribunal is best placed to finally determine all issues and disputes between the parties (see *Cargil Internation SA and Anor v. Bangladesh Sugar & Food Industries Corporation* [1998] 2 All ER 406 at p. 410).

The First Defendant's Arguments

[7] The first defendant asserts that the issues pertaining to the Retention Bond, no matter how they are phrased, are ultimately contractual issues involving the plaintiff and the first defendant. The arbitration contract does not encompass the said Retention Bond. There is no other separate arbitration agreement between the plaintiff and the first defendant, written or otherwise. It is clear from s. 10, that the court can only grant stay of proceedings if and only if there is an arbitration agreement. In the absence of such agreement, the court should not exercise any discretion to allow a stay of proceedings. The issues in the current arbitration between the first defendant and the second defendant are separate and distinct from those before the court in this originating summons. In the arbitration proceedings, aside from the other

issues arising from the underlying Construction Contract, the issues pertaining the Retention Bond are, *inter alia*: (a) whether the second defendant is under an obligation to maintain the Retention Bond to a certain date; and (b) whether the first defendant's call on the Retention Bond was justified under the Construction Contract, ie, was there any breach or non-performance by the second defendant. The arbitration concerns the merits in the underlying Construction Contract, and the breaches thereof which will include the above issues (a) and (b) concerning the Retention Bond. In determining the declarations sought in encl. 1 this court is not concerned with such issues in the Construction Contract. There is therefore no multiplicity of proceedings or risks of any conflicting findings as alleged by the second defendant. Also, if the Retention Bond issue has to be determined in the arbitration it would certainly defeat the very purpose of an irrevocable and unconditional bond, and in fact make the issuance of such bond frivolous. (see *Esso Petroleum Malaysia Inc v. Kago Petroleum Sdn Bhd* [1995] 1 CLJ 283, *Isyoda (M) Sdn Bhd v. Mimos Bhd* [2000] 1 MLJ 227).

[8] Before this court determines whether to grant a stay of proceedings on encl. 1, it would be prudent to first examine whether there is any material or substantial difference between the Arbitration Act 1952 (the 1952 Act) and the Arbitration Act 646 of 2005 ('the 2005 Act').

[9] The relevant provisions of the 1952 Act read:

> 2. Interpretation
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> In this Act unless the context otherwise requires:
>
> 'arbitration agreement' means a written agreement to submit present or future differences to arbitration, whether an arbitrator is named therein or not;
>
> 6. Power to stay proceeding where there is submission to arbitration
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> If any party to an arbitration agreement or any person claiming through or under him commences any legal proceedings against any other party to the arbitration, or any person to be referred to arbitration, any party to the legal proceedings may, before taking any other steps in the proceedings, apply to the court to stay the proceedings and the court, if satisfied that there is no sufficient reason why the matter should not be referred in accordance with

the arbitration agreement, and that the applicant was at the time when the proceedings were commenced and still remains ready and willing to do all things necessary to the proper conduct of the arbitration, may make an order staying the proceedings.

[10] I shall now juxtapose the analogous or corresponding provisions in the 2005 Act.

Interpretation

2.(1) In this Act, unless the context otherwise requires:

'arbitration agreement' means an arbitration agreement as defined in section 9.

Arbitrability of subject-matter

4. (1) Any dispute which the parties have agreed to submit to arbitration under an arbitration agreement may be determined by arbitration unless the arbitration agreement is contrary to public policy.

(2) The fact that any written law confers jurisdiction in respect of any matter on any court of law but does not refer to the determination of that matter by arbitration shall not, by itself, indicate that a dispute about that matter is not capable of determination by arbitration.

9. (1) In this Act, 'arbitration agreement' means an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not.

(2) An arbitration agreement may be in the form of an arbitration clause in an agreement or in the form of a separate agreement.

(3) An arbitration agreement shall be in writing.

(4) An arbitration agreement is in writing where it is contained in:

(a) a document signed by the parties;

(b) an exchange of letters, telex, facsimile or other means of communication which provide a record of the agreement; or

(c) an exchange of statement of claim and defence in which the existence of an agreement is alleged by one party and not denied by the other.

10. (1) A court before which proceedings are brought in respect of a matter which is subject of an arbitration agreement shall, where a party makes an application before taking any other steps in the proceedings, stay those proceedings and refer the parties to arbitration unless it finds:

(a) that the arbitration agreement is null and void, inoperative or incapable of being performed; or

(b) that there is in fact no dispute between the parties with regard to the matter to be referred (to arbitration).

(2) The court, in granting a stay of proceedings pursuant to subsection (1), may impose any conditions as it deems fit.

(3) Where the proceedings referred to in subsection (1) have been brought, arbitral proceedings may be commenced or continued, and an award may be made, while the issue is pending before the court.

18. (1) The arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement.

(2) For the purpose of subsection (1):

(a) an arbitration clause which forms part of an agreement shall be treated as an agreement independent of the other terms of the agreement; and

(b) a decision by the arbitral tribunal that the agreement is null and void shall not ipso jure entail the invalidity of the arbitration clause.

(3) A plea that the arbitral tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defence.

(4) A party is not precluded from raising a plea under subsection (3) by reason of that party having appointed or participated in the appointment of the arbitrator.

(5) A plea that the arbitral tribunal is exceeding the scope of its authority shall be raised as soon as the matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings.

(6) Notwithstanding subsections (3) and (5), the arbitral tribunal may admit such plea if it considers the delay justified.

A (7) the arbitral tribunal may rule on a plea referred to in subsection (3) or (5), either as a preliminary question or in an award on the merits.

(8) Where the arbitral tribunal rules on such a plea as a preliminary question that it has jurisdiction, any party may, within
B thirty days after having received notice of that ruling appeal to the High Court to decide the matter.

(9) While an appeal is pending, the arbitral tribunal may continue the arbitral proceedings and make an award.

C (10) No appeal shall lie against the decision of the High Court under subsection (8).

[11] After having studied generally all the corresponding provisions in the 1952 and 2005 Arbitration Acts, I am of the considered
D opinion that there is substantial and material difference in their respective provisions pertaining to various aspects of arbitration. The significant difference in approach which the court is enjoined to adopt also includes its determination on applications for stay of court proceeding, such as in the instant case before me. My
E reasons are here set out.

[12] Under s. 9 of the 2005 Act, the term 'arbitration agreement' has assumed a much wider meaning to include an agreement by the parties to submit to arbitration all or certain disputes which
F have arisen or which may arise between them in respect of a defined legal relationship whether contractual or not. And, though "an arbitration agreement shall be in writing", there need not be a separate arbitration agreement per se, as it may be in the form of an arbitration clause in any written agreement or even in the
G form of an exchange of letters, telex, facsimile or any other means of communication or written record which evinces the fact that such an agreement existed between the parties.

[13] Notwithstanding that s. 6 of the 1952 Act gives a fairly wide discretion to the court to make on order staying the proceedings,
H upon application of any party to the legal proceedings – provided that the application is made before taking any other steps in the proceedings – if satisfied that the matter should be referred in accordance with the arbitration agreement, and the applicant was at the time of and since commencement of the proceedings still
I remains ready and willing to do all things necessary to the proper conduct of the arbitration. Yet, s. 10 of the 2005 Act, has now –

with the use of the word 'shall' – made it mandatory for the court to stay the proceedings in respect of any matter before which any proceedings are brought and refer the parties to arbitration "unless it finds – (a) that the agreement is null and void, inoperative or incapable of being performed; or (b) that there is in fact no dispute between the parties with regard to the matters to be referred." Though the provision of this new Act that the application must be made before any other steps are taken in the proceedings is common with the old Act, it is pertinent to note that the court's discretion to impose any direction as it deems fit when making an order for stay is unencumbered under the new Act. Also to be noted is that the party making the application need not be a party to the court proceedings itself so long as the matter in dispute is closely or directly connected with or pertains to the subject of the arbitration agreement on which the court proceedings are brought. A further important point to note is that even while any issue is pending before such proceedings in court, whether stayed or not, the "arbitral proceedings may be commenced or continued, and an award may be made, while the issue is pending before the court."

[14] The only conclusion I can draw from the import of this entirely new provision in s. 10 when read with s. 18 of the 2005 Act, is that with this new Act, Parliament has clearly given the arbitral tribunal much wider jurisdiction and powers. And, such powers would extend to cases even when its own jurisdiction or competence or scope of its authority, or the existence or validity of the arbitration agreement is challenged. A further point to note is that even when an arbitral tribunal holds that an agreement is null and void, it "shall not *ipso jure* entail the invalidity of the arbitration clause" since "an arbitration clause which forms part of an agreement shall be treated as an agreement independent of the other terms of the agreement." Most noteworthy is that even where its own jurisdiction or competence or its scope of authority is challenged, it may rule on such plea either as a preliminary question or in an award on the merits. And, where the tribunal rules against the challenge on such a plea as a preliminary question any party may appeal to the High Court against such ruling but while the appeal is pending the arbitral tribunal may continue with the arbitral proceedings and make an award. With the view to preventing any inordinate delay in resolution of disputes the legislature has decreed that no further appeals shall lie from the High Court against a challenge on jurisdiction of an arbitral tribunal.

[15] It is vital to note that in the case at hand, it is common ground that neither of the two exceptions in s. 10(1)(a) or (b) above apply. Here it is crucial to bear in mind that the First defendant itself had said that one of the two issues pertaining to the Retention Bond would entail the determination of the question whether the second defendant is subject to a contractual obligation (under the Construction Contract) to maintain the Retention Bond, the other being whether the first defendant is justified to make the call on the Retention Bond under the Construction Contract. This determination of these two issues would necessitate a finding whether there was any breach or non-performance of the construction contract – indeed, the very crux of the dispute in the ongoing arbitration proceedings.

[16] In this context it is essential to set out the unambiguous wordings of cl. 34 of the Construction Contract that the two defendants had agreed to. In the agreement, cl. 34, which in my view is very wide, provided as follows:

> 34.1 in the event that **any dispute or difference arises between the Employer,** or the Architect on his behalf, **and the Contractor, either during the progress or after completion or abandonment of the Works** regarding;
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> 34.1(i) **any matter or thing of whatsoever nature arising thereunder or in connection therewith,** including any matter or thing left by this Contract to the discretion of the Architect; or
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> 34.1(ii) the withholding by the Architect of any certificate to which the Contractor may claim to be entitled to; or
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> 34.1(iii) the measurement and valuation in sub-clause 30.5(i) [deleted]; or
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> 34.1(iv) the rights and liabilities of the parties under Clauses 25.0, 26.0, 31.0; or
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> 34.1(v) the unreasonable withholding of consent or agreement by the Employer or the Architect on his behalf or by the Contractor;

then such disputes or differences shall be referred to arbitration.

34.2 Upon the disputes or differences having arisen then;

34.2(i) any party may serve written notice or the other party that such disputes or differences shall be referred to an arbitrator to be agreed between the parties; or

34.2(ii) failing agreement or absence of reply or reluctance to act by the other party then the party serving the written notice may after the expiration of fourteen (14) days from the date of the notice to concur on the appointment of an Arbitrator, apply to the President or Deputy President for time being of Pertubuhan Akitek Malaysia to appoint an arbitrator and such arbitrator so appoint shall be deemed to be appointed with the agreement and consent of the parties of this Contract.

[17] I think it essential to remember that the question whether or not any given dispute comes within the provisions of an arbitration clause would primarily depend upon the terms of the clause. The answer to this question must depend on (a) what is the dispute, and (b) what disputes the arbitration clause covers.

[18] In *Haymen and Anor v. Darwins Ltd* [1942]1 All ER p. 337 the House of Lords had held that an arbitration clause which contained the words "any dispute shall arise between the parties hereto in respect of this agreement or any of the provisions herein contained or anything arising hereout the same shall be referred for arbitration …" is wide enough and still remains effective to cover a situation even where the injured party has accepted repudiation, such as the claim that 'the contract has come to an end" – as for example, by frustration – since in such cases it is the performance of the contract that has come to an end.

[19] The question has to be judged by an interpretation of the arbitration cl. 34. Surely, the particular manner of expression, "any matter or thing of whatsoever nature arising thereunder or in connection therewith," and "any dispute or difference arise … either during the progress or after completion or abandonment of the works" in cl. 34, rather than the restrictive words "under this agreement" denotes a clear intention of both parties to have a very much wider ambit for arbitral method of dispute resolution. For these reasons, I find and hold that cl. 34 is wide enough to bring this issue of the Retention Bond within the ambit of the

ongoing arbitral proceedings. Indeed, upon the determination by the arbitrator of the dispute, pursuant to cl. 34, an accounting between the first and the second defendant could and should include the question of the Retention Bond. To hold otherwise would be to allow the first defendant to steal a march on the realization of the Retention Bond in the teeth of what they have agreed to in cl. 34.

[20] A similar situation occurred in *Government of Gibraltar v. Kenney and Another* ([1956] 3 All ER 22). In that case the first defendant had been employed by the plaintiffs as a quantity surveyor under an agreement which specified the remuneration which he was to receive and provided by cl. 9, that if any dispute or difference should occur between the parties in relation to anything or matter arising out of or under the agreement it should be referred to arbitration. Disputes having arisen concerning the first defendant's remuneration, the second defendant was appointed sole arbitrator and the first defendant delivered points of claim. The plaintiffs contended before the arbitrator that some of the matters referred to in the points of claim were outside the scope of the submission to arbitration in cl. 9. The arbitrator, before coming to any determination on the matters raised, ruled that he had jurisdiction to hear the reference and the plaintiffs now sought a declaration to the contrary effect. The disputed matters in the points of claim included a claim by the first defendant for a sum of money on a quantum meruit for services rendered, it being alleged that the agreement had ceased to have any application to these services, and an alternative claim for a similar sum alleged to be payable, if the contract was adjudged to have been frustrated, partly under the Law Reform (Frustrated Contracts) Act 1943, and partly on a quantum meruit.

[21] Therein it was held that the claim for a quantum meruit, and the alternative claim in the event of the agreement being adjudged to have been frustrated, were both claims arising out of the agreement within the ambit of the arbitration clause and were matters which ought to be determined by the arbitrator and which could conveniently be determined by him, as there was no such clear separation of issues as would put one or more outside the arbitration agreement.

[22] In the instant case the second defendant has raised the issue of validity of the demand on the Retention Bond made by the first defendant. This issue, which, in my opinion, clearly comes within the ambit of cl. 34, can only be determined through a further finding on the dispute to issues (a) and (b) aforesaid concerning the Retention Bond which the First Defendant has submitted for arbitration. I must say that for the purpose of the stay application, the dispute on the nature of the Retention Bond (performance bond) – as to whether it is conditional or unconditional – is irrelevant. It is also pertinent to note that the issue of the Retention Bond raised in the originating summons before this court have been mutually submitted to the jurisdiction of the arbitral tribunal by the first and second defendants and are due to be determined in the arbitration now afoot. It would follow that the first defendant is now estopped from contending otherwise. In the circumstances, I hold therefore that where there is a clear overlap between the issues to be determined by this court and the arbitral tribunal (as the case here), a common law court should yield to the latter by giving s. 10(1) Arbitration Act 2005 its clearly intended effect.

[23] As the plaintiff has taken a neutral stance, the real issue is whether the Retention Bond (*vide* letter of guarantee) dispute could be decided within the ambit of the construction agreement between the first and the second defendants, who are indeed parties to the arbitration clause in the agreement. On the point raised by the first defendant that the plaintiff is not a party to any arbitration agreement between any of the defendants or among them, I must say that there seems to be a confusion here pertaining to the existence of issues between the parties (as has occurred between the first and second defendants) as opposed to the existence of a cause of action which is, in law, predicated upon the existence of a contractual or tortious nexus between litigants. Clearly, in my view the Retention Bond dispute is merely an issue incidental to the cause of action between the two defendants, and this issue can be resolved in the arbitration proceedings. The bank need not be a party to the arbitration agreement *vis-a-vis* with both or any one of the two defendants since it (the plaintiff) was merely drawn into the fray on the issue of the Retention Bond which has arisen only between the defendants.

A **Sanctity Of Mutual Contracts**

[24] The court will not re-write the contract or "audit the bargain made between the parties" but will hold them to the contract that they have made by giving effect to the clear and
B unequivocal words of the contract. See *Halsbury's Laws of England* (4th edn.) vol. 9 para 316, *Chan Whye & Sons Contractors (suing as a firm) v. Sarawak Shell Bhd.* [2003] 5 MLJ 68 and *Datuk Yap Pak Leong v. Sababumi (Sandakan) Sdn. Bhd.* [1997] 1 CLJ 23. It is pertinent to note that even before the new provision in s. 10(1)
C of the Arbitration Act 2005 there is a welter of compelling *dicta* in support and affirmation of the sanctity of a mutual contractual bargain, as the following cases will illustrate.

[25] In the case *Inter Maritime Management Sdn Bhd v. Kai Tai Timber Company Ltd Hong Kong* [1995] 4 CLJ 164, the Court of
D Appeal held, per Gopal Sri Ram JCA:

> It is my view that the law has reached a stage where it may be quite safely said that there is really no difference in principle between cases where an application to stay is sought upon the
E ground that there is an exclusive jurisdiction clause and those cases where a stay is sought upon the ground that there is in existence an agreement to refer disputes to arbitration. According to the authorities that I have perused, a plaintiff in either case is required to show strong grounds why he should not honour the bargain he made with the defendant.

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[26] Further, in *Seloga Jaya Sdn Bhd v. Pembenaan Keng Ting (Sabah) Sdn Bhd* [1994] 2 CLJ 716 Edgar Joseph Jr SCR had occasion to make the following observation:

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> … But, generally, as the judge rightly recognized, the approach of the court will be that those who make a contract to arbitrate their disputes, should be held to their bargain for, in the oft-quoted works of Martin B in *Wickham v. Harding*, 'A bargain is a bargain, and the parties ought to abide by it, unless a clear reason applies for their not doing so. (p. 112-G to H).

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[27] The *dicta* of Hashim Yeop A Sani CJ (Malaya) in the case of *Perbadanan Kerajaan Negeri Perak v. Asean Security Paper Mill Sdn Bhd* [1991] 3 CLJ 2400; [1991] 1 CLJ (Rep) 362 *('Asean Security Paper Mill')* is illuminating. This was what his Lordship had
I to say:

On the arbitration clause the learned judge concluded that the plaintiff, being party to the agreement, cannot now choose not to be governed by the arbitration clause. It was, he said, the prima facie duty of the court to act on the agreement, citing Selbourne LC in *Willesford v. Watson* [1873] LR 8 Ch 473:

> If parties choose to determine for themselves that they will have a domestic forum instead of resorting to the ordinary courts, then, … a *prima facie* duty is cast upon the courts to act on such agreement.

[28] The Supreme Court's ratio in *Asean Security Paper Mill (supra)* was adopted by the Court of Appeal in *Accounting Publication Sdn Bhd v. Ho Soo Furniture Sdn Bhd* [1999] 1 CLJ 765, where Gopal Sri Ram JCA, delivering the judgment of the court, went further, to say (at p. 503G) that:

> It is settled law that, given a dispute, a court must compel the parties to adhere to the terms of the arbitration agreement entered into by them even though it may appear, from the evidence presented upon the application for a stay, that the defendant is unlikely to succeed before the arbitrator.

[29] For all the above compelling reasons and in order to prevent a multiplicity of or inconsistent decisions being reached on the same issues herein by the two jurisdictions, a stay of the proceedings ought to be and is now granted in terms of prayer 1 of encl. 6 with costs in the cause.